(2)

Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-2004

In The

Supreme Court of the United States

October Term, 1993

STATE OF OHIO,

Petitioner,

v.

HARRY C. DENUNE, et al.,

Respondent.

Petition For Writ Of Certiorari
To the Court Of Appeals
Butler County, Ohio

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL T. GMOSER CO., L.P.A.
720 Society Bank Building
Hamilton, Ohio 45011
(513) 844-8888

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

I. WHETHER A POTENTIAL INJURY TO THE ENVIRONMENT WHERE NO EMERGENCY SITUATION OR IMMINENT DANGER EXISTS CONSTITUTES EXIGENT CIRCUMSTANCES WHICH AUTHORIZE A WARRANTLESS ENTRY.

II. WHETHER PROBABLE CAUSE FOR A WARRANTLESS SEARCH EXISTS WHEN INVESTIGATORS BASE THEIR SUSPICIONS ON AN UNRELIABLE ANONYMOUS TIP WITH NO INVESTIGATORY CORROBORATION.

III. WHETHER THE INDEPENDENT SOURCE DOCTRINE APPLIES WHEN CONSENT TO SEARCH WOULD NOT HAVE BEEN OBTAINED NOR A WARRANT ISSUED BUT FOR INFORMATION SECURED FROM AN INITIAL UNLAWFUL SEARCH.

IV. WHETHER AN INDIVIDUAL MAY ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED UPON AN INDEPENDENT EXPECTATION OF PRIVACY IN THE INVADED PLACE.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI 5

I. EXIGENT CIRCUMSTANCES REQUIRE NOT JUST A POTENTIAL INJURY TO THE ENVIRONMENT BUT AN EMERGENCY SITUATION OR IMMINENT DANGER AND IF NONE EXISTS, A WARRANT MUST BE OBTAINED 5

A. NO GOOD FAITH BELIEF OF EXIGENT CIRCUMSTANCES EXISTS WHEN INVESTIGATORS CONDUCT A WARRANTLESS SEARCH BASED ONLY UPON A POTENTIAL FOR HARM TO THE ENVIRONMENT AND NO EMERGENCY SITUATION OR IMMINENT DANGER EXISTS 7

B. EXIGENT CIRCUMSTANCES DO NOT REQUIRE ACTUAL HARM BUT REQUIRE AN ACTUAL EMERGENCY SITUATION OR THAT HARM TO THE ENVIRONMENT IS IMMINENT 9

II. NO PROBABLE CAUSE FOR A WARRANTLESS SEARCH EXISTS WHEN INVESTIGATORS BASE THEIR SUSPICIONS ON AN UNRELIABLE ANONYMOUS TIP WITH NO INVESTIGATORY CORROBORATION 10

TABLE OF CONTENTS – Continued

Page

III. THE INDEPENDENT SOURCE DOCTRINE DOES NOT APPLY BECAUSE THE WARRANT IN THIS CASE WOULD NOT HAVE BEEN ISSUED BUT FOR INFORMATION SECURED FROM THE ORIGINAL UNLAWFUL SEARCH 13

IV. BASED UPON THE FACTS IN THIS CASE, SOLE SHAREHOLDER DENUNE HAD AN INDEPENDENT PRIVACY INTEREST IN THE ILLEGALLY SEARCHED PROPERTY 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Aguilar v. Texas, 378 U.S. 108 (1964) 11

Giordenello v. United States, 357 U.S. 480 (1971) 11

Illinois v. Gates, 462 U.S. 213 (1983) 11

Katz v. United States, 389 U.S. 347 (1967) 5

Michigan v. Tyler, 436 U.S. 479 (1978) 5, 9, 10

Murray v. United States, 487 U.S. 533 (1988) 14

Rakas v. Illinois, 439 U.S. 128 (1978) 15

United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 475 U.S. 1144 (1986) 5

United States v. Callabrass, 607 F.2d 559 (2nd Cir., 1979), cert. denied, 446 U.S. 940 (1980) 6

United States v. Johnson, 524 F.Supp. 199 (D. Del. 1981) 6

United States v. Leon, 468 U.S. 897 (1984) 7

United States v. Lindsey, 877 F.2d 777 (9th Cir. 1989) 5, 8

United States v. Moskow, 588 F.2d 882 (3rd Cir. 1978) 6

United States v. Urban, 710 F.2d 276 (6th Cir. 1983) 5

United States v. Vicknair, 610 F.2d 372 (5th Cir. 1980), cert. denied, 449 U.S. 823 (1980) 15

United States v. Williams, 626 F.2d 697 (9th Cir. 1980), cert. denied, 449 U.S. 1020 (1980) 5

No. 92-2004

In The

Supreme Court of the United States

October Term, 1993

STATE OF OHIO,

Petitioner,

v.

HARRY C. DENUNE, et al.,

Respondent.

Petition For Writ Of Certiorari
To the Court Of Appeals
Butler County, Ohio

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case presents issues of Fourth Amendment law based upon the facts surrounding a warrantless search of a storage trailer determined to contain hazardous material. The issues raised by the petitioner were rejected by the Butler County, Ohio Court of Appeals and petitioner's motion for Leave to Appeal and Request for Rehearing was denied by the Ohio Supreme Court.

Respondent Harry C. Denune (Denune) is a person in the business of selling various parts and salvage, doing business under his solely owned corporation, Respondent

Dixie Distributing Company, Inc. (Dixie) located in Springfield, Ohio. On November 8, 1988, investigators of the Ohio Environmental Protection Agency (OEPA) received an anonymous tip as set forth in petitioner's Statement of the Case. However, for clarification, this tip was first received anonymously from the Springfield, Ohio Fire Department which communicated the tip to the Ohio Bureau of Criminal Identification and Investigation which thereafter communicated the anonymous tip to the OEPA. This tip asserted that a trailer would leave the business location of Dixie in Springfield, Ohio loaded with transformers which contained a chemical hazardous material known as PCB.

Upon receipt of the anonymous, unverified information, the OEPA placed the Dixie location under surveillance in the morning hours of November 9, 1988, through the morning of November 10, 1988. The petitioner maintains that the OEPA agents were not authorized to make any stop or investigation of the subject trailer while on the roads of Ohio. However, the record of this case is absent any evidence that the OEPA joined with any agency that had such power during the period of surveillance even though OEPA presumably was armed with knowledge that the subject trailer would travel public roadways. At approximately 7:00 a.m. on November 10, 1988, a person arrived at the Dixie location, entered a tractor-trailer on the Dixie premises and drove off the site. The OEPA investigator had no personal knowledge whatsoever of the contents of the subject tractor-trailer and continued his surveillance by following the vehicle.

The subject tractor-trailer was followed along a route south on Interstate 75 where it was seen to stop at a Gold

Star Chili Restaurant for a break in travel. It then proceeded to Butler County, Ohio, where it arrived at a location known as Canal Auto and Truck (CA&T). Upon the tractor-trailer's arrival at this location, the trailer was detached from the tractor and the driver, with the tractor, departed the area.

Following this observation, investigators of the OEPA approached the subject trailer and found it padlocked. There was no basis upon which the contents of this trailer could be determined from an outside visual inspection. There were no observed findings of any chemical reaction, leakage or other indicator in the experience of the OEPA investigators that the trailer contained any chemical substance or that any chemical substance had spilled. Testimony was adduced that the subject trailer, as well as others, was located on a flood plain area.

It was determined that CA&T operated as a rental location for trailers that were used for the storage of various items. The keys to the locks on the trailers were in the possession of the owners thereof and a caretaker of the CA&T facility was located on the premises for further protection. After learning that the caretaker was not given possession of the keys to the locks on the locked trailers the OEPA inspectors obtained permission from the caretaker of the CA&T to break the lock on the subject trailer. Once the investigators obtained access, they found a number of transformers containing PCB chemicals. No search warrant for this search was obtained, nor was consent for search of this trailer obtained from either Denune, who signed the checks for the rent of this location, or from Dixie.

Only after this search was conducted were the other trailers on space rented by Denune and/or Dixie searched. The other trailers were searched after obtaining a warrant based upon information obtained in the first warrantless search. This resulted in further seizure of various chemical substances located within the trailers which have now been properly disposed of by respondents to the satisfaction of the petitioner. As a result of the evidence thus obtained, Denune individually, and as agent and employee of Dixie, and Dixie, were indicted for various violations of environmental law. These charges were first defended with a number of motions, including a motion to suppress the evidence obtained on November 10, 1988. The motions challenged the absence of a search warrant and probable cause for the search of the first trailer.

The petitioner argued that Ohio statutory law permitted "carte blanche" search of all of the trailers without a warrant as a part of the statutory investigative and inspection procedures granted to the OEPA. The trial court concluded that the warrantless search was permissible under the statutory authority in Ohio and a joint trial proceeded resulting in the conviction of Denune and Dixie on the various charges against them. The Court of Appeals rejected the argument of "carte blanche" authority for the warrantless search of the subject trailer and further rejected other arguments made by the petitioner in an effort to sustain the validity of the warrantless search. This decision was thereafter appealed by the Petitioner to the Ohio Supreme Court. Petitioner's Motion for Leave to Appeal was denied and petition for rehearing before that Court was also denied.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

I. EXIGENT CIRCUMSTANCES REQUIRE NOT JUST A POTENTIAL INJURY TO THE ENVIRONMENT BUT AN EMERGENCY SITUATION OR IMMINENT DANGER AND IF NONE EXISTS, A WARRANT MUST BE OBTAINED

Searches conducted without a warrant "are per se unreasonable under the Fourth Amendment – subject to only a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Michigan v. Tyler*, 436 U.S. 479, 509 (1978), this Court recognized an exception to the warrant requirement where exigent circumstances exist. This Court defined an "exigent circumstance" as a situation in which " . . . there is a compelling need for official action and no time to secure a warrant." At the same time, however, this Court also specifically limited the scope of warrantless searches by regulatory agencies to "an emergency situation". *Id.* at 509.

The petitioner argues that potential injury to the environment constitutes an exigent circumstance which authorizes a warrantless entry. The petitioner has unsuccessfully tried to compare the facts in this case with other cases where federal courts have recognized circumstances in which law enforcement officers have entered premises without a warrant because of the need to take quick action to prevent imminent danger from fires, bombs and explosions. *United States v. Lindsey*, 877 F.2d 777, 781-782 (9th Cir. 1989); *United States v. Al-Azzawy*, 784 F.2d 890, 895 (1985), cert. denied, 475 U.S. 1144 (1986); *United States v. Urban*, 710 F.2d 276, 277 (6th Cir. 1983); *United States v.*

Williams, 626 F.2d 697, 703 (9th Cir. 1980), cert. denied, 449 U.S. 1020 (1980); *United States v. Callabrass*, 607 F.2d 559, 564 (2nd Cir., 1979), cert. denied, 446 U.S. 940 (1980); *United States v. Moskow*, 588 F.2d 882 (3rd Cir. 1978); and *United States v. Johnson*, 524 F.Supp. 199, 204 (D.Del. 1981). The ruling in this case is not in conflict with any of these cases because an emergency situation did not exist in this case.

The investigators obviously did not feel that an emergency situation existed when the trailer was being transported on the highways or when it stopped at a chili restaurant for lunch, because the investigators did nothing until the trailer came to a permanent rest in the salvage yard. The petitioner would have this Court believe that the investigators lacked the authority to stop the trailer while it was moving, yet there is nothing in the record to show that the State inspector alerted any agency with such authority to conduct an investigation into the suspected transport of hazardous waste.

According to the petitioner, the investigator made a warrantless search in this case because he felt there was a potential for a spill in the trailer which possibly contained PCBs because the trailer was parked in an environmentally sensitive area. As the Court of Appeals correctly pointed out, there was nothing in the evidence or facts of this case to show that there was an emergency situation or that any harm to the environment was imminent. The investigators "saw no leakage from the trailer or other evidence that any chemicals were in danger of being released." (A-13). Based upon the facts in this case, the

Court of Appeals correctly held that there was no indication that immediate action was necessary to prevent harm to the environment.

The Court of Appeals also dealt correctly with the petitioner's claim that the investigator made the search because of the trailer's potential mobility. The Court of Appeals found that since the trailer had been disconnected from the tractor and the tractor had been driven from the premises, there was no showing of a likelihood that the trailer would be transported from the site. (A-13). Therefore, the Court of Appeals correctly held that in this case, the automobile exception to the warrant requirement was inapplicable.

A. NO GOOD FAITH BELIEF OF EXIGENT CIRCUMSTANCES EXISTS WHEN INVESTIGATORS CONDUCT A WARRANTLESS SEARCH BASED ONLY UPON A POTENTIAL FOR HARM TO THE ENVIRONMENT AND NO EMERGENCY SITUATION OR IMMINENT DANGER EXISTS

The petitioner is seeking redress through this Court to carve out new ground by seeking to define exigent circumstances as "a good faith response to circumstances known at the time of the warrantless entry." (Petitioner's brief, p. 10). The petitioner bases its reasoning upon the good faith exception to the exclusionary rule adopted by this Court in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon* and the other cases the petitioner cites (Petitioner's brief, p. 10), the Court has allowed evidence which was seized by a police officer who in good faith believed a warrant to be valid, a statute to be constitutional or

consent by a third party to be good. In these cases the police officers were mistaken but they had relied in good faith upon a warrant, a statute or consent.

The OEPA inspectors in this case conducted a warrantless search because of a potential for harm, not a good faith belief that harm was imminent or that an emergency situation existed. The fact that neither the attendant nor the owners at CA&T had a key to the padlocked trailer only put the inspector on notice that no consent could be given and a warrant was required for a legal entry. The fact that the inspector retreated after the search only confirms that no emergency situation existed because the slight oil leakages were confined to the inside of the trailer – something the inspectors already knew from their inspection of the outside of the trailer. Yet, these are the factors petitioner cites as showing "good faith" on the part of the inspector. These are not factors upon which this Court can carve out an exception to the exclusionary rule based upon a mistaken but good faith belief that exigent circumstances exist.

The petitioner argues that whether exigent circumstances exist "must be judged from circumstances known . . . prior to the warrantless action." *United States v. Lindsey*, 877 F.2d 777, 782 (9th Cir. 1989) and not based upon a hindsight examination of this case. Yet, as previously stated, the petitioner has failed to show any factors upon which the investigators could actually have made a good faith determination that exigent circumstances existed. Therefore, it is the petitioner who is looking at this search from hindsight and trying to establish exigent circumstances which did not exist at the time of the search.

The petitioner's argument is an after-the-fact bootstrap claim to support a search it erroneously believed was justified by an Ohio statute. The Court of Appeals held erroneous the position of the trial court and petitioner that the Ohio Statute, R.C. Chapter 3734, gave the OEPA "carte blanche" authority to conduct searches for suspected hazardous waste violations. (A-8). The appellate court held that nothing in the statutory scheme can be read to eliminate the requirement for a search warrant. (A-9). The court held:

> "To the extent that these provisions address the authority of OEPA, they merely authorize the investigation, inspection and prosecution of hazardous waste violations. No language in these sections or elsewhere in R.C. Chapter 3734 can be fairly read to abolish the warrant requirement for searches conducted by OEPA . . . (A-10).

B. EXIGENT CIRCUMSTANCES DO NOT REQUIRE ACTUAL HARM BUT REQUIRE AN ACTUAL EMERGENCY SITUATION OR THAT HARM TO THE ENVIRONMENT IS IMMINENT

The petitioner is again trying to carve out a new exception which would allow State investigators to conduct a warrantless search to "determine the nature and extent of a potential danger" (Petitioner's brief, p. 12). What the petitioner is missing here is that this Court requires not just a potential for harm, but that an "emergency situation" must exist. *Michigan v. Tyler,* 436 U.S. 479, 509 (1978). In practice, the petitioner's exception would allow an investigator to make a warrantless search

under the guise of exigent circumstances whether or not an emergency situation exists. This Court has not allowed a warrantless search unless an emergency situation exists, nor should it in this case.

Petitioner erroneously argues that the Court of Appeals ruling in this case is inconsistent with this Court's recognition that the potential for harm may create an exigency. The petitioner further argues that the appellate court would require the State to stand by and allow the public to suffer an "irreversible injury" before any action to protect the public safety could be taken. (Petitioner's brief, p. 12).

The Court of Appeals ruling is perfectly consistent with this Court's decisions because as previously stated, in those cases where an emergency situation exists and there is truly imminent danger to life or property, this Court has held that time is of the essence and has allowed warrantless searches because there was a need for immediate action. But in this case, the petitioner failed to show that an emergency situation existed or that there was a "compelling need for official action and no time to secure a warrant." *Tyler* at 509. Absent that showing, the warrantless search in this case was illegal, and this Court should not grant certiorari to carve out a new exception which would erode Fourth Amendment rights.

II. NO PROBABLE CAUSE FOR A WARRANTLESS SEARCH EXISTS WHEN INVESTIGATORS BASE THEIR SUSPICIONS ON AN UNRELIABLE ANONYMOUS TIP WITH NO INVESTIGATORY CORROBORATION

Whether or not probable cause existed in this case was determined not by a neutral and detached magistrate

as the constitution requires, but instead by an investigator who, like a police officer, is "engaged in the often competitive business of ferreting out crime." *Giordenello v. United States*, 357 U.S. 480, 486 (1971). The petitioner argues that the investigator had probable cause to make the warrantless search upon the padlocked trailer in this case. Respondent argues that the search was conducted upon the basis of an unreliable anonymous tip. There was no investigatory corroboration by investigators to lead them to "the fair probability that contraband or evidence of a crime will be found in a particular place . . . . " *Illinois v. Gates*, 462 U.S. 213, 238 (1983). The holding of the appellate court in this case is not in conflict with any higher court. The appellate court correctly found that information in the anonymous tip was non-specific and uncorroborated by any evidence that a crime was in fact taking place. Therefore, no probable cause existed to make the warrantless search.

The initial warrantless search in this case took place following the receipt of an unverified, anonymous, third-hand tip, first to the Springfield Fire Department, then to the Bureau of Criminal Identification and Investigation (BCI), and finally to the Ohio Environmental Protection Agency (OEPA). Since the tip was anonymous, there was no evidence regarding the underlying circumstances which led to this information or that the informant was reliable or credible. *Aguilar v. Texas*, 378 U.S. 108 (1964). The tip was devoid of any uniqueness. It indicated only that a trailer containing PCB's would be leaving the Dixie warehouse immediately before an OEPA inspection. There was no indication that the caller told the investigators which trailer would be moved or where the trailer

would be taken. The Court of Appeals correctly found that even if the information contained in the tip was later proven to be true, that the information was not sufficiently specific to provide probable cause to search the trailer. (A-12).

Further, there was no investigatory corroboration of any criminal conduct through the surveillance of the OEPA in this case. The Court of Appeals held: "We cannot say that the mere fact of a trailer being moved from a large warehouse early in the morning is so unusual or indicative of criminal conduct as to give probable cause to search." (A-12). The Court of Appeals further held that the fact that the trailer was heavily laden and slowly moving up hill or that it was parked in an environmentally sensitive area did not give rise to a suspicion of criminal activity nor should it have a bearing on the investigator's belief in the nature of its contents. (A-12). None of the factors suspected by the investigators as indicative of criminal behavior were inconsistent with any other reasonable theory for the trailer being on the road. These factors did not call for the conclusion that hazardous waste was probably being transported. An infinite number of possibilities does not equal a probability.

Finally, the petitioner argues that the analysis of the Court of Appeals imposed a requirement upon law enforcement officers to establish "concrete reasons" in order to demonstrate probable cause. (Petitioner's brief, p. 14). The Court of Appeals found that " . . . the investigators had no concrete reason to believe that the drums in the six trailers contained hazardous waste. (A-12). Obviously, the Court of Appeals believed that the mere

appearance of fifty-five gallon drums does not restrict the contents therein to hazardous waste just because these drums are sometimes used for that purpose. (A-12). The drums could conceivably carry anything from bolts to nuts. The Court of Appeals correctly based its opinion that the investigators did not have probable cause by " . . . viewing the totality of the circumstances . . . ". (A-13). Therefore, this case is not in conflict with any decisions in any higher courts and certiorari should not be granted.

III. THE INDEPENDENT SOURCE DOCTRINE DOES NOT APPLY BECAUSE THE WARRANT IN THIS CASE WOULD NOT HAVE BEEN ISSUED BUT FOR INFORMATION SECURED FROM THE ORIGINAL UNLAWFUL SEARCH

The petitioner has attempted to distance itself from the illegal search of the trailer on November 10, 1988 by asserting that subsequent searches of the remaining trailers at a later date were based on independent source information. This is factually absurd in this case. Clearly, when the investigator broke the padlock of the first trailer on November 10, 1988, it was confirmatory in the mind of the investigator of all that followed and was the basis upon which subsequent searches were made and evidence seized.

The petitioner argues that the affidavits in support of the search warrant for the trailers subsequently searched were based upon observation and information gathered by the agents of the OEPA during a consensual search of the trailers on November 15, 1988, five days after the

subject warrantless search of the first trailer. The petitioner asks this Court to recognize this consent to search as a viable independent source of evidence after the warrantless entry.

In order for the independent source doctrine to apply, the evidence initially discovered unlawfully must be seized in a manner independent of the original discovery. *Murray v. United States,* 487 U.S. 533 (1988). In *Murray* this Court held that the independent source doctrine does not apply if the warrant would not have been issued but for the information secured from the original unlawful search. This Court further held that the doctrine is also inapplicable if the officers' decision to request the warrant was prompted by what they had seen during the initial entry.

This certainly rings a familiar bell with the facts in this case. The police investigators would not have sought consent or the warrant to search the other trailers but for what they had seen in the unlawful confirmatory search of the first trailer on November 10, 1988. The Court of Appeals implicitly agreed and to hold otherwise would defy logic and common sense based on the straightforward factual presentation in this case.

IV. BASED UPON THE FACTS IN THIS CASE, SOLE SHAREHOLDER DENUNE HAD AN INDEPENDENT PRIVACY INTEREST IN THE ILLEGALLY SEARCHED PROPERTY

The petitioner erroneously argues that the Court of Appeals established a theory of "automatic standing"

giving shareholder Denune Fourth Amendment protection based solely upon his ownership and control of the Dixie corporation. To the contrary, the Court of Appeals correctly based its decision upon the degree of control which Denune exercised over the entire operation of the corporation in general and, more importantly, over the property which was the subject of the warrantless search in this case. No "automatic standing" theory has been established by the Court of Appeals in this case and there is no conflict with its holding and that of any other higher Court decisions on this issue.

The test to determine whether or not a person has "capacity to claim the protection of the Fourth Amendment" is whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. *Rakas v. Illinois*, 439 U.S. 128, 133-4 (1978). In order to assert the corporation's Fourth Amendment rights, a stockholder must show that he has an independent privacy interest in the property. *United States v. Vicknair*, 610 F.2d 372, 394 (1980). In this case, the Court of Appeals correctly held that Denune had a legitimate expectation of privacy in the searched property because he was more than a shareholder, he had sole control over the entire operation of the business and the property which was the subject of this warrantless search.

The testimony in this case established that no substantial decision affecting the business of the corporation could be made without Denune's authorization (A-7, A-8). More importantly, as the Court of Appeals points out, Defendant Denune had complete control over the movement of all equipment and inventory, including the trailer that was the subject of the warrantless search in

this case. Denune personally handled every detail of the transportation and storage of the trailer in question (A-8). He and he alone had the key to the padlocked trailer. Therefore, the Court of Appeals correctly held that by his close personal contact with the searched property, Denune did demonstrate a privacy interest which was independent of Dixie's.

The Court of Appeals was also quick to point out that the petitioner vehemently painted Denune and Dixie with the same brush in this case, telling the jury in no uncertain terms they were in fact, one and the same. Accordingly, the Court of Appeals properly ruled that the petitioner should not now be heard to say that Denune does not have a privacy interest in the property searched in this case. (A-8). It should also be noted that as a result of the trial Court's ruling denying the motion to suppress for both Denune and Dixie, they were tried jointly and all evidence received against Dixie was received against Denune.

CONCLUSION

Because no conflict exists between this case and higher Court cases in Ohio and the United States Supreme Court, and because the issues presented by the petitioner turn upon factual interpretation and a request

by the petitioner to make new law, certiorari is not proper in this case and should be denied.

Respectfully submitted,

MICHAEL T. GMOSER CO., L.P.A.
720 Society Bank Building
Hamilton, Ohio 45011
(513) 844-8888

Attorney for Respondent